JD(SF)–49–04
San Ramon, CA
San Pablo, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SAN RAMON REGIONAL MEDICAL CENTER, INC. d/b/a SAN RAMON REGIONAL MEDICAL CENTER

and Case 32-CA-20157

CALIFORNIA NURSES ASSOCIATION

DOCTORS MEDICAL CENTER-SAN PABLO/PINOLE, INC., d/b/a DOCTORS MEDICAL CENTER

and Case 32-CA-20158

CALIFORNIA NURSES ASSOCIATION

Virginia Jordan, Atty., Oakland, CA,
for the General Counsel.
James A. Bowles, Atty., Hill, Farrer & Burrill, LLP,
Los Angeles, CA, for Respondent.
M. Jane Lawhon, Atty., Law Offices of James
Eggleston, Oakland, CA, for Charging Party.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge: Pursuant to notice a hearing in this matter was held before me in Oakland, California on January 29 and 30, 2004. The charges were filed by California Nurses Association (Union) on November 8, 2002. Thereafter, on August 29, 2003, the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a consolidated complaint and notice of hearing alleging violations by San Ramon Regional Medical Center, Inc. d/b/a San Ramon Regional Medical Center (San Ramon Medical Center or Respondent) and by Doctors Medical Center-San Pablo/Pinole, Inc., d/b/a Doctors Medical Center (Doctors Medical Center or Respondent) of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended (Act). The Respondents, in their answers to the complaint, deny that they have violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the Respondent, and counsel for the Union.

Following the close of the hearing Counsel for the General Counsel filed a Motion to Stay Filing of Briefs and to Remand Case. In support of her motion the General Counsel maintains that the Respondents presented at the hearing a valid defense to the allegations of the complaint by establishing that the Respondents constituted either a joint employer or were

components of a larger multi-hospital single employer, and that therefore, as stated on the record by the General Counsel at the outset of the hearing, the Respondents were privileged to require two shared employees to work at their home facility or not work at all during the course of a strike.

The Union filed an opposition to the General Counsel's motion. Thereafter, on April 23, 2004, I issued an order denying the General Counsel's motion as follows:

> The General Counsel has at all times taken the position that if the Respondent is able to show that the various entities comprising the Respondent are a single employer or joint employer, then the Respondent's defense to the complaint is valid, and the cases should be dismissed. The Union has participated fully in this proceeding and has disputed the alleged single or joint employer status of the Respondent. In addition, the Union maintains that even if a single or joint employer relationship exists, nevertheless one hospital comprising a single or joint employer may not refuse to permit employees striking a different facility from working during the strike.
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> The matter has been litigated, and at this stage of the proceeding it seems appropriate to continue with the established procedure of briefing followed by the issuance of a comprehensive decision based upon the record evidence and arguments of the parties, rather than permitting an ex parte disposition premised on one party's view of the evidence and law. Accordingly, the General Counsel's motion is denied.

Counsel for the General Counsel did not file a brief in this matter, but rather relies upon the representations in the aforementioned motion.

Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

Findings of Fact

I. Jurisdiction

Each Respondent is a California corporation. Respondent San Ramon Medical Center operates a hospital in San Ramon, California, and Respondent Doctors Medical Center operates a hospital in San Pablo, California. Each Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of $250,000, and annually purchases and receives goods and materials valued in excess of $5,000 which originate outside the State of California. It is admitted and I find that each Respondent is, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

II. The Labor Organization Involved

The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

A. Issues

The principal issue in this proceeding is whether the Respondents have violated Section 8(a)(1) and (3) of the Act by refusing to permit shared employees who are engaged in an economic strike at one hospital from working, during the course of the strike, at the other hospital.

B. Facts

During her opening statement and prior to the taking of any evidence, Counsel for the General Counsel stated the Region's position as follows: That if the Respondents constituted a joint employer or single employer, then they were within their right to notify shared employees "that because of the greater need at San Pablo [Doctors Medical Center] their hours were being re-allocated. All hours worked were being re-allocated to San Pablo."

Both Respondents are affiliated with a nationwide hospital organization that is comprised of an umbrella corporation, Tenet Healthcare Corporation, and many subordinate affiliated corporations. In California, an affiliated corporation known as Tenet California, Inc. has some 36 hospitals under its aegis, two of which are the Respondents in this case. Each hospital is a separate corporation, the shares of which are owned by Tenet HealthSystem Hospitals, Inc. Each hospital has a chief executive officer who is hired by and is on the payroll of Tenet HealthSystem Hospitals, Inc. In turn, the chief executive officer of each hospital selects the chief operating officer and other administrative team members, including the chief nursing officer and the human resources director for that hospital, but the hiring and salaries of these individuals require final approval by Tenet California, Inc.

Tenet California, Inc. has a chief nursing officer who is responsible for assisting nursing administration, enhancing the quality of patient care, and overseeing centralized recruitment efforts at each of the hospitals under Tenet California, Inc. Since at least 1992, all of the Tenet-affiliated hospitals in California have used the Tenet brand or logo, and each of the hospitals in their advertising, brochures, employee handbooks, and web sites show this affiliation. In addition, the registered nurses at each hospital wear photo-identification badges containing the Tenet logo.

Billing and collections for each of the five Tenet California, Inc. hospitals in Northern California, including the Respondents, are handled by a common central business office located in Modesto, California. The bank accounts for each of the Tenet California, Inc. hospitals are commingled in one bank account.

All Tenet California, Inc. hospitals are provided legal counsel of whatever kind, including labor attorneys, by Tenet HealthSystem Hospitals, Inc. or a different Tenet entity. Individual hospitals do not hire attorneys or make decisions regarding overall labor relations strategies, the conducting of campaigns involving union organization, the selection of principals for negotiating labor agreements, the terms and conditions of employment embodied in labor agreements, or related matters. Rather, all such decisions are made by Tenet California, Inc. or a different Tenet entity.

All Tenet California, Inc. hospitals are subject to the policies and procedures established by Tenet HealthSystem Hospitals, Inc. While the hospitals may adopt local policies, such policies must not conflict with the policies established by Tenet HealthSystem Hospitals, Inc. or

Tenet California, Inc. One of these policies common to all Tenet hospitals is a formal policy, known as the "Shared Employment" policy, that establishes the procedure whereby Tenet-affiliated hospitals may share employees, including supervisors and managers. Thus, for example, a registered nurse who is hired at one hospital, which thereby becomes the RN's home or primary hospital, may also work at another affiliated hospital upon first submitting a written "transfer request " and obtaining authorization from the nurse manager at the home hospital to do so.[1] The requisite formal paperwork documents required for hiring an employee are maintained by the home hospital and are considered to constitute the employee's primary personnel file. Shared employees receive one paycheck from the home hospital for work at both hospitals during a given pay period. Overtime and other benefits, including the employee's participation in the Respondents' 401(k) plan, if eligible, are computed as if the employee worked at only the home hospital during the pay period. [2]

Tenet's Shared Employment policy states:

> POLICY: Tenet will follow very strict and specific guidelines regarding employees who are concurrently employed by more than one Tenet facility. Tenet will aggregate all hours worked by employees for the organization for the purpose of determining total overtime liability and administering the Tenet Retirement Plan. The following additional guidelines will also apply to shared employee circumstances: 1) No current Tenet employee may also work as a temporary agency employee for any Tenet facility, 2) No current Tenet employee may also work as an independent contractor for any Tenet facility, 3) A Tenet employee who is exempt salaried may not work for any other Tenet facility in a non-exempt role without prior approval from the employees Home Facility Human Resources department, 4) The maximum number of hours an employee is permitted to work in shared employment may at any time be limited at management's discretion for safety, job performance, or any other reason, 5) Any Tenet employee who wishes to perform volunteer services at a Tenet facility must obtain prior approval from his/her Home Facility Human Resources Department.

As an employee has already been technically "hired" by the home hospital, and the necessary paperwork process has been completed, the principle inquiry made upon interviewing at the second hospital is the employee's ability to perform the particular job for which he or she is applying. RNs who begin working at a secondary hospital must continue to meet their scheduling obligations at the home hospital in order to maintain eligibility to continue working at the secondary hospital. Their employment benefits are dictated by the home hospital. They are subject to separate supervision, separate performance reviews, and local policies at each hospital.

The foregoing is premised on testimonial and documentary evidence. Although the

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[1] Tenet hospitals may be in close proximity to each other, as are the Respondents in this case, and the shared employment policy provides employees, who may be motivated by scheduling considerations, opportunities for additional hours and/or preferred jobs, personal preference, or geographical convenience, the option of obtaining additional work at nearby Tenet facilities.

[2] For internal accounting purposes each hospital is charged separately for the hours worked by a shared employee. However, overtime hours are charged to the hospital where the overtime, calculated on the combined hours at both hospitals, actually occurs. It is thus not unusual that, for example, the home hospital would incur overtime charges even though the employee had worked most of his or her hours at the second hospital.

record contains additional evidence of the interrelationship between the various Tenet entities, under the circumstances it appears unnecessary to present an exhaustive recounting of the evidence presented by the Respondents. As noted, the General Counsel has taken the position that the Respondents have met their burden of proof and that the complaint should be dismissed.

While the Union generally denies that the Respondents constitute a joint employer or are components of a single employer under the Tenet umbrella, it does not point out any evidence in support of its assertions, and has not offered any evidence that contradicts the evidence presented by the Respondents.

The Union has been the collective bargaining representative of a unit of registered nurses at Doctors Medical Center in San Pablo, a 232-bed hospital. Unsuccessful contract negotiations between the Union and Doctors Medical Center resulted in a strike on November 4, 2002. [3] Two part time RNs, Heather Bontempo and Sharone Fuchs, with their primary facility being Doctors Medical Center, were shared employees with San Ramon Medical center, a 123-bed hospital located some 33 miles from Doctors Medical Center.

Pam Pshea, interim chief nursing officer for San Ramon Medical Center, testified that on about November 5, 2002, she was advised by Bill Mattox, regional vice-president for the Northern Region of Tenet California, Inc., who was in charge of employee relations, that the two shared employees would not be allowed to work at San Ramon Medical Center during the strike because they were needed at Doctors Medical Center, their home facility. She was given a prepared script to read to the employees. She called them separately on November 6, 2002, and read the following script on the phone to them:

> Because of the operational needs of your primary place of employment, San Pablo, all hours scheduled at San Ramon will be assigned at San Pablo. This will be in effect until operational needs at San Pablo are resolved.

Bontempo testified that Pshea read her this message. Fuchs testified that she received a phone call from Pshea on November 4, and that Pshea said the need for nurses was greater at Doctors Medical Center and that if she wanted to work she could work there. Fuchs asked why, saying that even though there had always been a greater need at Doctors Medical Center, she had never before been pulled from a shift at San Ramon Medical Center to fill a vacant shift at Doctors Medical Center. Pshea replied, according to Fuchs, “a line had to be drawn in the sand, and if I wanted to work, I could go to work at San Pablo. I could not continue my schedule at San Ramon.” Pshea testified that she did not say anything to either employee about “drawing a line in the sand.” [4]

Julie Kline, chief nursing officer at Doctors Medical Center, testified that polling of the nurses prior to the strike indicated that very few nurses intended to cross the picket line, and

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[3] Shortly before the strike commenced the Union prevailed in a representation election among the registered nurses at San Ramon Medical Center. Neither Bontempo nor Fuchs, who were included in the unit at their home facility, was permitted to vote in this election.

[4] I credit the testimony of Pshea that she read the same scripted message to both employees and did not say anything about drawing a line in the sand.

there was a critical need for nurses who "knew our system, knew our computer system, knew how to put orders into the computers, and had that skill set, was (sic) important to us. "

The strike was settled in December 2003. During the interim period, the Union also became the certified collective-bargaining representative of the registered nurses at San Ramon Medical Center. Contracts with both hospitals, negotiated by Tenet corporate human resources personnel, were reached simultaneously, together with a "labor accord" agreement between the Union and Tenet California, Inc. The labor accord embodies a model contract that will become the collective-bargaining agreement for registered nurses employed by all Tenet-affiliated California hospitals after selecting the Union through a representation election.[5] Also, as part of the accord or model agreement, there is an expedited election process, a moratorium on strikes, mandatory neutral arbitration for any disputes, and an agreement by the Union to accept the nationwide Tenet health plan and existing 401(k) plan for all Tenet-affiliated California hospitals. [6]

C. Analysis and Conclusions

The complaint alleges that employees Fuchs and Bontempo were "terminated" from San Ramon Medical Center at the request of Doctors Medical Center. There is no evidence to support this allegation. Neither employee testified that she was told she was terminated, or that Doctor's Medical Center requested her termination. Rather, both employees were told that they would simply not be permitted to continue working at their secondary facility while they were on strike or refusing to work at their home facility, and that the decision had been made by Tenet corporate personnel. Accordingly, I find that the employees were not terminated as alleged in the complaint.

It is clear that the Respondents are components of a single employer and therefore are not separate, distinct employers. Thus, the evidence shows that they have common management, namely, Tenet HealthSystems, Inc. The chief executive officers of each hospital are neither selected nor appointed by, nor are they on the payroll of a particular hospital; rather, they run the hospitals as employees of Tenet HealthSystems, Inc. Further the foregoing evidence shows centralized control of labor relations, an interrelationship of operations, and common ownership or financial control. See *Pathology Institute, Inc*., 320 NLRB 1050, 1053-1054 (1996); *Mercy General Health Partners*, 331 NLRB 783, 784 (2000).

I also find that the two Respondents are joint employers as a result of the interrelationship established by the shared employment program and the other indicia of common control as components of Tenet California, Inc., and Tenet HealthSystems, Inc. Employees are hired by one entity, which remains their home facility, and may not obtain work or continue to work at an affiliated facility without permission from the home facility. They receive one combined paycheck for their work at both facilities, and their benefits are predicated upon the benefits to which they are entitled at the home facility. See *TLI, Inc.*, 271 NLRB 798 (1984) ("where two separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for purposes of the Act.") Joint supervision is not necessary for a joint employer finding. *See The Brookdale Hospital Medical Center*, 313 NLRB 592, 593 (1993).

[5] The labor accord also provides for bargaining over local or individual hospital issues.
[6] It was this latter issue that largely precipitated the strike at Doctors Medical Center.

The Union maintains that, assuming *arguendo* the existence of a joint employer or single employer relationship, it is nevertheless violative of the Act for one joint employer (or component of a single employer) to deny employment opportunities to employees because they elect to engage in a strike against another joint employer. In other words, Section 8(a)(3) of the Act should be given preference over the joint employer or single employer concept because of the overriding importance of employees' rights under the Act. The Union cites no specific authority for this proposition, and characterizes this case as one of first impression.

Having found that there is only one single employer, the Union's argument seems to conflict with the concept that an employer is not required to subsidize the strike activities of its employees. See, for example, *Southwestern Electric Power Company*, 216 NLRB 522 (1975), Thus, should Bontempo and Fuchs be permitted to work at San Ramon Medical Center during the strike, Doctors Medical Center would be obligated to furnish them with their paychecks and, in addition, with the benefits to which they would be entitled as if they had been working at Doctors Medical Center. Further, while the employees would nominally be earning wages from San Ramon Medical Center, these expenses would ultimately be incurred by the parent Tenet Healthcare Corporation.

The Respondents also argue that the principles established in economic lockout cases are applicable to the instant situation. See *American Ship Building v. NLRB*, 380 U.S. 300 (1965). Thus, it is argued that the employer herein has the right to lock out employees at one location because they are striking at another location of the same employer.

The Respondents maintain that the Union has no standing to make an argument that conflicts with the General Counsel's theory of the case, citing *ATS Acquisition Corp*., 321 NLRB 712, fn. 3 (1996). In that case, at footnote 7, the Board, relying on Sunland Construction *Co*., states: "…a charging party is not free to seek remedies contingent on an amendment to the complaint or a theory of the case different from that of the General Counsel." Here, the Union is advancing a theory of the case that is not only inconsistent with, but is directly contrary to the theory on which the Regional Office determined to issue the complaint. Moreover, the theory and the proposed remedy advanced by the Union have been expressly disavowed by the General Counsel. Thus, as noted above, at the outset of the hearing the General Counsel stated that the only issue in doubt was the status of the employing entities. Accordingly, I agree with the Respondents that the Union is precluded from seeking to litigate other issues. I shall dismiss this matter on that basis.

On the basis of the foregoing, I shall dismiss the complaint in its entirety.

Conclusions of Law

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents have not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, I issue the following recommended:

ORDER[7]

.5 The complaint is dismissed in its entirety**.**

Date: June 18, 2004

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Gerald A. Wacknov
Administrative Law Judge

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[7] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.